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IN THE

Supreme Court of the United States

October Term, 1966.

No. 773.

MANDELL, SPECTOR, RUDOLPH CO.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF.

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PAGE

INDEX.

	Page
SUPPLEMENTARY STATEMENT	2
ARGUMENT	3
1. Respondent's Brief Effectively Concedes That Petitioner Was Denied Its Statutory Right to Achieve Compliance	3
2. The Government Is Improperly Attempting to Avoid the Requirement of § 9(b) of the Administrative Procedure Act by Invoking Now, for the First Time, the "Willfulness" Exception	4
CONCLUSION	5
APPENDIX	7
Affidavit of Ned Stein	7
Affidavit of Irvin Spector	9

TABLE OF CITATIONS.

Cases:	Page
Chattanooga Pharm. Assn. v. United States Department of Justice, 358 F. 2d 867 (6th Cir. 1966)	2
Securities Exchange Commission v. Chenery Corp., 318 U. S. 80, 87 L. Ed. 626, and 332 U. S. 194, 91 L. Ed. 1995	5
Statute:	
Administrative Procedure Act, 60 Stat. 242, § 9(b), 5 U. S. C. § 1008(b)	4, 5

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PAGE

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SUPPLEMENTARY STATEMENT.

The Government's Brief contains numerous distortions of the Record and even matters outside the Record. Corrections and refutations of the more important of these points are set forth in the footnote.[1]

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1. The Government has disputed petitioner's offer to make restitution (U. S. Brief, p. 10, n. 9) and the effect of the threatened license suspension upon petitioner's business (U. S. Brief, p. 12, n. 12). Petitioner has therefore reprinted as an Appendix hereto the Affidavits of Ned Stein, counsel, and Irvin Spector, President of MSR, which were submitted as exhibits to the Petition for Rehearing below. The Government advised the court below by letter of September 9, 1966 that it chose not to respond thereto because "no significant matters not previously briefed or argued orally by the parties" were raised. The averments of the affidavits were thus admitted by the Government. *Chattanooga Pharm. Assn. v. United States Department of Justice,* 358 F. 2d 867 (6th Cir. 1966).

It is not true that the 35 shipments in the second investigation were selected for detailed examination "at random" (U. S. Brief, p. 4, p. 10, n. 10, p. 11). The Department investigators testified that they went "back and forth" through all of MSR's files and selected those shipments which were processed and sold by MSR in the shortest time. They thus selected an unrepresentative sample of the fastest-moving transactions in which error was most probable because of the time-pressure under which records thereof necessarily were kept (R. 101-02a, 289a-95a). After going through all of MSR's files the 35 shipments were the only ones in which the investigators reported incorrect accountings.

The "notations" which the Government contends (U. S. Brief, p. 4, n. 4, p. 11, n. 11) "indicated that overpayments were deliberately made" were in some cases found in shipments in which the investigators found an "underpayment" (E.g., R. 359a-61a). Taking into account the unlikelihood that one would deliberately pay too much and the arbitrary averaging techniques employed by the investigators to reach their findings, the record indicates that there was neither an underpayment nor an overpayment in these transactions.

ARGUMENT.

1. Respondent's Brief Effectively Concedes That Petitioner Was Denied Its Statutory Right to Achieve Compliance.

The record is clear that petitioner actually achieved compliance with the PACA provisions and Regulations prior to the disciplinary proceedings by revising and reforming its system of record-keeping and accountings to shippers (R. 300a-04a, 308a, 321a). The Government continues to ignore this fact, but has now retreated from its extreme position below that it was impossible for petitioner to achieve compliance. In this Court the Government concedes that it was at least "conceivable" for petitioner to achieve compliance by making restitution to shippers; it then contends that the Department afforded petitioner its statutory "opportunity" to make compliance by requesting such restitution, which petitioner failed to make. Yet the Government admits that at the crucial time when restitution was requested by the Department, petitioner actually offered full restitution of the disputed underpayments, to be considered as compliance, thereby terminating the disciplinary proceedings. The Department rejected this offer on the ground that petitioner could not, as a matter of law, achieve compliance.

Although the Government now states that the Department's rejection of petitioner's offer of repayment was "not surprising", surely it would have been most surprising for petitioner to pay over sums of money which it believed and believes it did not owe with no assurance that its payment would resolve the dispute—and, in fact, in the face of the Government's contention that such payment would be a futile and pointless act.

The "condition" which the Government claims petitioner placed upon its offer of payment was nothing more

than the legal right established by § 9(b) of the APA for petitioner's protection. Under § 9(b), the opportunity to achieve compliance must be afforded in advance of license suspension proceedings in order to give the licensee a chance to *avoid* them. The Government's request for restitution while denying the concomitant opportunity for avoidance of disciplinary proceedings was obviously a denial of the opportunity to achieve compliance. It position here that petitioner failed to achieve compliance by its failure to make restitution is thus not only untenable but lacking in candor.

2. The Government Is Improperly Attempting to Avoid the Requirements of § 9(b) of the Administrative Procedure Act by Invoking Now, for the First Time, the "Willfulness" Exception.

The Department's Complaint against petitioner did not charge any willfull violation of the PACA. In fact, it alleged that petitioner had been afforded the opportunity to "achieve compliance", applicable under § 9(b) of the APA to non-willful violations only (R. 3a-16a). Petitioner was thus on notice that the case against it was one for non-willful violations, and the case was heard on that basis.

Regardless of the Judicial Officer's gratuitous comment that if necessary he could have found willfulness, the fact remains that he made no such finding. Indeed a suspension order based upon a finding of willfulness would have deprived petitioner of due process because no such violation had been charged.

The Government expressly advised the court below that the question of whether or not the violations were willful was "irrelevant" in this case (Respondent's Brief below, p. 45, n. 24). Now, apparently recognizing the weakness of its position on the "compliance" issue, it has boldly reversed its position of many years and seeks to exclude petitioner from the protection guaranteed it by § 9(b), by labelling this case, for the first time, as one of "willful-

ness". The impropriety of raising this contention on review when it was not raised below,[2] is here compounded by the new problems of deprivation of due process and substantiality of evidence which arise if the willfulness issue is now to be injected into this case.

CONCLUSION.

Since willfulness was neither found nor charged, since petitioner was deprived of its right to make compliance, and since the interpretation of the § 9(b) right by the court below has effectively destroyed the protection guaranteed federal licensees, petitioner again urges that a writ of certiorari issue to review the decision of the Court of Appeals for the Third Circuit for the reasons stated in its Petition.

Respectfully submitted,

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2. Moreover, this Court has established as a "fundamental rule of administrative law" that a reviewing court may not uphold an agency determination by substituting a basis other than that invoked by the agency. *Securities Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 87-88, 87 L. Ed. 626, and 332 U. S. 194, 196, 91 L. Ed. 1995, 1999.

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APPENDIX.

Affidavit of Ned Stein.

(Exhibit "A", to Petition for Rehearing below.)

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } ss.:

I, NED STEIN, attorney for Mandell, Spector, Rudolph Co., being duly sworn according to law, depose and say:

1. That I was personally present at the time when the representatives of the U. S. Department of Agriculture determined the amount that was allegedly due Hicks Produce Company which was done in the office of Mandell, Spector, Rudolph Co. Payment was made at that time without being an admission of liability on the part of Mandell, Spector, Rudolph Co. and with the further understanding that there would be no further proceedings or investigation of Mandell, Spector, Rudoph Co. by representatives of the U. S. Department of Agriculture.

2. That immediately following the payment in the Hicks Produce Company matter, the representatives of the U. S. Department of Agriculture returned for the purpose of checking the records of Mandell, Spector, Rudolph Co. as to any further alleged violations and that hundreds of files were inspected by the representatives and eventually the representatives of the U. S. Department of Agriculture claimed alleged overpayments and underpayments on 35 shipments; that a request for payment of the alleged overpayments and underpayments was made, and your affiant offered on behalf of Mandell, Spector, Rudolph Co. to make such payment to the representatives of the U. S. Department of Agriculture providing it was understood that the disclipinary proceedings against Mandell, Spector, Rudolph Co. would be terminated; that at the time that the amount was submitted to Mandell, Spector, Rudolph

Co. for payment, all of the books and records of Mandell, Spector, Rudolph Co. were put into compliance with the regulations of the U. S. Department of Agriculture; that present at the said discussion were your affiant and Paul Koenigsberg, Mr. Carlucci and Harry Apostoleris, all representatives of the U. S. Department of Agriculture, Mr. Rudolph, Mr. Spector and Mr. Mandell. At the said time, the representatives of the U. S. Department of Agriculture refused to agree that the payment would constitute compliance and therefore terminate the disciplinary proceeding that had been instituted, and accordingly payment was not made, because we believed payment should constitute compliance and it was felt that payment may constitute an admission of liability in the pending disciplinary proceeding which we had denied at all times..

NED STEIN

Sworn to and subscribed before me this 2d day of September, 1966.

Affidavit of Irvin Spector.

(Exhibit "B" to Petition for Rehearing below.)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

I, IRVIN SPECTOR, being duly sworn according to law, depose and say that I am Presidenf of Mandell, Spector, Rudolph Co., and:

1. That I was present at the time that the investigation of the Hicks Produce Company compliant was completed and an amount was determined to be due and payable to Hicks Produce Company; also present were Paul Koenigsberg, Harry Apostoleris and Mr. Carlucci, representing the U. S. Department of Agriculture, and Ned Stein, William Mandell and Charles Rudolph, on behalf of Mandell, Spector, Rudolph Co.; that payment was made on the promise of the representatives of the U. S. Department of Agriculture that there would be no further proceedings or investigation against Mandell, Spector, Rudolph Co., and that the payment was made without an admission of liability.

2. Immediately thereafter, an informal disciplinary complaint was lodged against Mandell, Spector, Rudolph Co., and after a lengthy investigation in which we cooperated and hundreds of files were examined, the representatives of the U. S. Department of Agriculture determined that there were 35 shipments on which there was a balance due by either overpayments or underpayments. A request was made for payment of this amount by the representatives of the U. S. Department of Agriculture, and Mandell, Spector, Rudolph Co. agreed to make this payment, without admitting any liability, provided further proceedings in connection with the disciplinary action would be terminated. The representatives of the U. S. Department of Agriculture stated that the acceptance of the amount allegedly found to be due could not be accepted as

a compliance by Mandell, Spector, Rudolph Co., but that the disciplinary complaint would have to continue to be processed. At this particular time, Mandell, Spector, Rudolph Co. had complied fully, insofar as the maintenance of its books and records is concerned, with the regulations of the U. S. Department of Agriculture.

3. At a time subsequent to the determination of the amount due on the 35 shipments which were the basis of the disciplinary complaint, your affiant met with John Dimond and Jack J. Gardner of the U. S. Department of Agriculture with a view of adjusting the complaint, and an offer was made by your affiant to make payment of the amount alleged by the Government to be due in connection with the 35 shipments providing it would be considered that Mandell, Spector, Rudolph Co. was in compliance and the disciplinary proceedings be terminated. This offer was rejected by Mr. Dimond.

4. A 90-day suspension will, in my opinion, effectively put this company out of business permanently, because our consignors will have to make arrangements with other brokers. This is what happened when another Philadelphia commission broker, Eastern Produce Co., was suspended for only 45 days a few years ago. It will destroy the livelihood of 30 innocent employees, and destroy a business now grossing approximately $5,000,000 a year, because of alleged estimated underpayments (and *overpayments*) totalling less than $4,000.

IRVIN SPECTOR

Sworn to and subscribed before me this 2d day of September, 1966.